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October 2001

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Editorial Layout: Charlene Hickey, chickey@imaweb.com

2001 Tulloch Rule: New and Revised?

Studer

By Stephen A. Studer, Plews Shadley Racher & Braun
317-637-0700

January 9, 2001, was a significant date for property containing wetlands. On the same day the U.S. Supreme Court issued its ruling in SWANCC*, the U.S. Environmental Protection Agency ("EPA") promulgated a final rule which revised the regulatory definition of "discharge of dredged fill material." The new rule, which refines a prior rule originally issued in 1993 and is commonly referred to as the "Tulloch Rule," is intended to close a "loophole" in the Clean Water Act ("CWA") created in part by earlier court decisions interpreting the rule. The new rule was originally scheduled to take effect February 16, 2001; however, on the day President George W. Bush was sworn into office, his Chief of Staff issued a Memorandum regarding new and pending regulations. The "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies" required regulations that had been published in the Federal Register, but which had not yet

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Environmentalists' Rulemaking Proposal to Restrict New Connections to Combined Sewer Systems

Kane

Larry J. Kane
Bingham Summers Welsh & Spilman
317-635-8900

Municipalities with combined sewer systems, already facing intractable regulatory and fiscal challenges presented by these systems, may find the problem growing much worse. A rulemaking petition to establish severe restrictions on future connections to combined sewer systems was filed with the Indiana Water Pollution Control Board at its August 2001 meeting.[1] This petition has been coordinated by Improving Kids' Environment (IKE) and supported by several other environmental organizations, including Hoosier Environmental Council, Izaak Walton League, Save the Dunes Council, SCREAM, and the Sierra Club.

The proposal would amend the Water Board's rules concerning permit requirements for construction of water pollution treatment control/facilities. Specifically, the proposal would require the DENIAL of an application for a permit to construct a sewer extension to connect a new development project to existing sewers IF sufficient capacity does not exist in the sewer collection system to convey the additional wastewater flow from the project to the wastewater treatment facility under all wet weather conditions involving a storm with a recurrence frequency of less than five years.

Although the proposal is not expressly limited to communities with combined sewer systems, it obviously would be more likely to affect those communities and their ability to accept prospective developments with wastewater treatment needs. Environmentalists contend that the proposal is needed to prevent the exacerbation of existing wet weather water quality problems which would occur if new additions of wastewater are

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taken effect, to be temporarily postponed for 60 days until the new department or agency head appointed by the President reviewed and approved the regulatory action. Consequently, implementation of the new Tulloch Rule was put on hold. On April 16, 2001, EPA Administrator Christie Whitman announced that the administration was endorsing the rule and making it effective April 17, 2001.

In 1993, the EPA and the U.S. Army Corps of Engineers (Corps) defined "discharge of dredged material" to include "any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S." 58 F.R. 45008 (August 25, 1993). This definition greatly expanded the activities that required a permit under §404 of the CWA for the discharge of dredged material into waters of the United States. The U.S. District Court for the District of Columbia invalidated the rule for exceeding the authority of the EPA and the Corps under the CWA. *American Mining Congress v. United States Army Corps of Engineers*, 951 F.Supp. 267 (D.D.C. 1997) (AMC); aff'd sub nom, *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir. 1998) ("NMA"). The court found that EPA and the Corps lacked authority under the CWA to regulate such activities if conducted so as to result in only "incidental fallback." The court defined this phrase to mean excavated material that falls back to substantially the same place as the initial removal. In an effort to respond to the NMA court's decision and to clarify what activities are regulated by §404 of the CWA, the EPA and the Corps promulgated the new definition of "discharge of dredged material" in addition to defining activities that merely result in "incidental fallback."

The EPA acknowledged in the preamble to the new rule that developers and landowners have been unsure as to whether their activities have required permits. In revising the definition of "discharge of dredged material," the EPA and the Corps state that their intention is to further wetland protection while providing more certainty in this respect.

The EPA and Corps have now adopted the following definition for the "discharge of dredged material": (2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA. 33 CFR §323.2(d)(2)(i) (Corps Regulation) and 40 CFR §232.2(2)(i) (EPA Regulation).

Moreover, after numerous comments to the proposed rule requesting a definition of what constitutes non-regulable incidental fallback, the EPA and Corps have adopted language consistent with the NMA opinion to develop the following definition: (ii) Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed. 33 CFR §323.2(d)(2)(ii) (Corps Regulation) and 40 CFR §232.2(2)(ii) (EPA Regulation)

The new rule reflects the agencies' opinion that the inherent purpose of using mechanized earth moving equipment is to move large portions of earth that is likely to result in more than just incidental fallback. From a practical perspective, the rule puts the burden on the owner to provide site-specific evidence that its activities are in fact resulting in only incidental fallback. The EPA and the Corps will rely, however, not only on evidence provided by the project proponent but on other evidence as well. For instance, evidence may also come from sources such as agency files or site visits. The agencies believe that this approach should give more guidance to developers while still offering the flexibility of case-by-case evaluations. In reality, the burden of providing site-specific evidence that the redeposit of dredged material is only incidental fallback will be all the more difficult since evidence provided by the project proponent will now be weighed with that of the agency making the determination.

Although the new rule proposes not to regulate activities that only generate "incidental fallback," many activities that might seem to constitute only a limited discharge will be regulated. When deciding whether an activity involves a regulated discharge or just incidental fallback, the agencies will look at whether material is displaced vertically or horizontally, in addition to the volume or amount of displaced material. Thus, even if material is not removed from a wetland or stream, but it is disturbed so that currents may move the material and redeposit it elsewhere within the wetland or stream, the activity may be considered a regulated discharge. 66 F.R. 4550, 4553. Part of the rationale for this position is that the agencies argue pollutants such as heavy metals and PCBs are often sequestered in sediments and may be released by disturbing the sediments. 66 F.R. 4550, 4565.

The new rule is not an "effects-based" test. That is, the agencies will look at the actual mechanics of activities, not the results of such activities in deciding whether a permit is required under §404 of the CWA. Therefore, some activities that cause only incidental fallback, but have significant adverse environmental effects, will not be regulated, while other activities having very little environmental impact may be regulated discharges. Even desirable activities like flood control or wetland restoration may require a permit under §404.

The preamble to the new rule provides some specific guidance as to what types of excavation activities would result in only incidental fallback. For instance, suction dredging operations, where the excavated material is pumped to an upland location or other container outside waters of the U.S. and does not cause re-suspending and relocation sediment downstream, would meet the incidental fallback criteria. So does discing, harrowing, and harvesting where soil is stirred, cut, or turned over to prepare for planting of crops, since these practices involve only minor

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Rulemaking

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allowed to already overloaded combined sewers.

While to some there may be a superficial allure to the environmentalists' proposal, a more thoughtful evaluation reveals that it would produce very serious adverse impacts to CSO communities which far overshadow its marginal benefits.

Background. It should be now well understood that adverse water quality impacts occur to public waters in most CSO communities as untreated wastewater is discharged from combined sewer overflows in wet weather conditions. Aged combined sewers experience, in varying frequencies, exceedances of their carrying capacity in wet weather when stormwater is added to the normal baseline flow of sanitary and other wastewater. When such stormwater flows not only exceed a combined sewer's hydraulic capacity but also the storage capacity of the immediate combined sewer system, a discharge of the excess flow typically occurs from one or more overflow points in the sewer system.

The bacterial content of CSO discharges is usually sufficient to exceed water quality criteria associated with full-body recreational use designations set by state water quality standards for virtually all water bodies of the state.

When a new housing development or other project which will generate wastewater is connected to a municipal sewer system which includes combined sewer interceptors in its critical path to the wastewater treatment facility, the additional wastewater could increase the volume and/or duration of CSO discharges which occur from the CSO-related interceptor under critical wet weather conditions.[2] It is this increase in CSO discharges that may result from the prospective development's connection to the sewer system that is targeted by the rulemaking proposal of IKE and other environmental organizations.[3]

The IKE Rulemaking Proposal. IKE's rule proposal addresses the state rule requiring a permit for the construction of water pollution treatment/control facilities, 327 IAC 3. These permit requirements expressly encompass the construction of sanitary sewer extensions to a municipality's sewer system.

Approval of a construction permit for a sewer extension to convey wastewater from a new connection is currently conditioned upon the availability at the wastewater treatment facility of sufficient capacity to treat the additional flow. 327 IAC 3-6-7(2). The environmentalists contend that this condition is myopic because it ignores the effects of the increased wastewater flow on the sewer system which is intended to convey the wastewater to the treatment facility. If the wastewater is discharged from CSOs upstream of the treatment facility, then treatment capacity is moot, as their argument goes.

To "cure" this deficiency, the IKE proposal would revise 327 IAC 3-6-7(2) to allow new sewer connections only where: "Sufficient capacity exists in the receiving collection system

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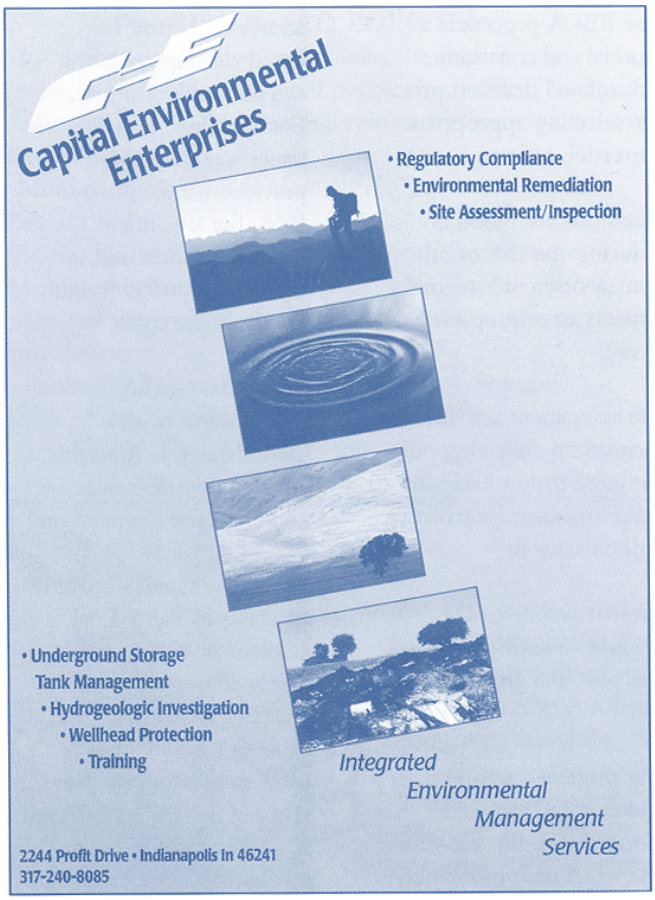

More *(Continued from page 1)*

redistribution of soil, rock, sand, or other surface materials. In addition, the use of K-G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not involve a discharge of dredged material. 66 F.R. 4550. 4554.

So what, in the opinion of the EPA and the Corps, is the difference between the 1993 Tulloch Rule and the 2001 Tulloch Rule? The 2001 rule explicitly and repeatedly excludes incidental fallback from the definition of "discharge of dredged material." The new rule also provides a descriptive definition of incidental fallback and explicitly indicates that project-specific evidence may be used to show that only incidental fallback will result from the activity. These provisions are a direct response to the NMA decision according to the agencies and the fact that the 1993 rule included *any* redeposit, including incidental fallback.

Legal challenges to the new Tulloch Rule have been brought by several organizations, including the National Stone, Sand and Gravel Association and the National Association of Home-builders. In response to concerns that the Bush Administration may enter into a settlement of the suit, two environmental groups have sought to intervene. The federal government has been given an extension of time to file its response until May 25, 2001.

It would appear that the EPA and Corps have issued the new Tulloch Rule in as narrow a manner as possible, without giving much heed to the rationale of the court in NMA. It remains to be seen whether the courts will again rein in the agencies or will accept the new rule. Perhaps the present administration can forge a compromise with industry groups that more accurately reflects the NMA decision, while still placating the environmentalists. If not, the EPA and the Corps will continue to litigate over this issue for some time.

NOTE: On a related matter, the U.S. Court of Appeals for the Fifth Circuit issued an opinion on April 25, 2001, holding that the EPA does not have authority under the Clean Water Act and the Oil Pollution Act to regulate discharges into subsurface waters or to intermittent creeks that are not sufficiently linked to an open body of navigable water. *Rice v. Harken Exploration Company*, (5th Cir. 2001, No. 99-11229). The court, relying on the recent decision of the U.S. Supreme Court in SWANCC, held there was nothing in the record to convince a reasonable trier of fact that a discharge into a "small seasonal creek" upgradient to a navigable water was sufficiently linked to that open body of navigable water as to qualify for protection.

**A copy of a newsletter focusing on SWANCC is available on the Plews Shadley Racher & Braun Web site at www.psrb.com.*

Rule *(Continued from page 1)*

and water pollution treatment/control facility to collect and treat the additional daily flow in all expected wet and dry weather conditions except during a wet weather event that is predicted to occur no more often than once every five years." [4]

Under this language, not only would the treatment plant need to have capacity to accept and treat the additional flow but also the sewer collection system would be required to have sufficient capacity to retain the additional flow under all wet weather conditions up to but not including the worst storm event which statistically occurs within a five-year period. If such capacity were not available in the sewer system, a construction permit to allow the sewer connection could not be granted.

Severe Restrictions on Community Development Would be Posed by the IKE Proposal. Many (perhaps most) municipalities with totally separate storm and sanitary sewers may be able to live with the IKE proposal.[5] However, for most (if not all) communities with combined sewers constituting a part of their sewer system, the IKE proposal, if adopted, would sound a death knell to future community growth and development, at least for those parts of a community linked to the wastewater treatment facility by combined sewers. Even after upgrades are made to combined sewer systems under long-term control plans in accordance with EPA's CSO Control Policy, it is doubtful that many CSO communities will have sufficient sewer capacity to avert overflows from combined sewers during storms with a two- or three-year recurrence period, let alone a five-year storm event.

Thus, the IKE proposal poses both short-term and long-term obstacles of major import to prospective development in CSO communities. The "short-term" describes the period during design and implementation of a community's long-term CSO control plan (LTCP). On the other hand, the "long-term" refers to conditions after implementation of a municipality's LTCP is complete.

Short-Term Impacts. During the short-term, before upgrades to the combined sewers are made under the LTCP, NO new connections could be made to the city's sewers, to the extent that the sewer system cannot retain stormwaters resulting from the five-year storm, unless on-site storage at the new development or other accommodations were made to offset the volume of wastewater to result from the new connection. The environmentalists would appear to suggest that such ad hoc measures are not too much to demand to prevent increased CSO overflows associated with proposed developments. For very small developments, holding tanks or basins to retain project wastewater during storm conditions may be feasible. However, for substantial projects, they are not likely to be.

Even more troublesome is that, even in the best case, the IKE proposal would produce (ignoring the cost hurdles) a random array of ad hoc storage facilities around the periphery of the combined sewer area which would bear no relation to the municipality's overall coherent LTCP for improvements to the combined sewer system. This approach would continually siphon funds away from the long-term goal to meet the exigencies of current development demands and thereby interfere with or work at cross purposes to the overall CSO control effort. Thus, IKE's proposal would be counterproductive to its goals: efforts to prevent marginal impacts from

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community growth would potentially overwhelm and debilitate the overall ability of the community to solve its long-term CSO control objectives.

Long-Term Impacts. IKE would have one believe that its proposal is aimed at the short term, prior to completion of LTCP implementation by CSO communities. However, whether intentional or not, the IKE proposal would have a long-term impact that is far more serious than the short-term problems already discussed. In essence, the IKE proposal would create a five-year design storm criterion which would "trump" the decisions that otherwise would be made in approval of LTCPs involving temporary suspensions of recreational uses under Senate Enrolled Act 431 of the 2000 General Assembly.

As alluded to above, it is doubtful that few communities with combined sewer systems would be able to contain hydraulic flows resulting from all wet weather conditions up to a five-year storm event, even after implementation of LTCPs for additional CSO controls. Instead, the expectation would be that CSO communities would qualify for temporary suspensions of recreational uses under SEA 431 (and thus a limitation on further CSO controls) for storm events considerably less severe than the five-year recurrence event.[6]

However, if the IKE proposal were adopted as law, the five-year storm event criterion would remain as a bar to additional connections to combined sewer systems regardless of whether LTCPs had been approved and implemented with lesser levels of CSO controls. Under such a scenario, communities would be consigned to economic impacts greater than those contemplated under the federal CSO control policy and truly severe constraints on the future economic and social development of Indiana's CSO communities would result.[7]

Conclusion. While under superficial evaluation the IKE proposal may appear to offer an alluring protection of water quality from prospective developers in communities with combined sewer systems, the reality is that it would have a severe impact on prospective economic and social growth and development in those communities. The IKE proposal would create short-term interferences with a CSO community's design and implementation of long-term CSO control plans. Of even more serious consequence would be its creation of a higher bar for CSO controls than is likely to result under federal and state CSO control policies and the recently enacted SEA 431. Indiana municipalities need to take the IKE proposal very seriously.

It is not yet known when the rulemaking petition will come before the Water Pollution Control Board for consideration. Indiana statute governing such petitions (IC 13-14-8-5) provides that, if the board finds that the rule proposal is not plainly devoid of merit and does not deal with a subject on which a rulemaking hearing was held within the six-month period preceding the petition, then the board shall hold a hearing on the proposal.

[1] See the website for Improving Kids' Environment – www.ikecoalition.org – for information concerning the petition and the rulemaking proposal. It is quite possible that the petition will have been filed by the time of publication of this article.

[2] It would be a misconception to think that the wastewater from the new connection would be preferentially displaced from the combined sewer during an overflow event. Instead, the overflow would be a composite of all upstream flows and would be likely to contain wastewater from the new connection in proportion to the percentage of the new wastewater flow to the overall flow in the sewer.

[3] For ease of reference, the rulemaking proposal will be referred to herein as the IKE proposal.

[4] Similar changes would occur under the IKE proposal to the certifications required of the design engineer and the entity having jurisdiction over the sewer system as specified in 327 IAC 3-6-4.

[5] Some municipalities with nominally separate storm and sanitary sewers nonetheless experience substantial leakage of water into the sewer system under wet weather conditions. Such communities may experience as great a difficulty in coping with the IKE proposal as a city or town with combined sewers.

[6] Under SEA 431, these temporary suspensions of recreational uses (applying during and immediately following storm events) would depend upon the successful performance of Use Attainability Analyses which demonstrate, in accordance with federal water quality regulations, that more stringent CSO controls would result in substantial and widespread economic and social impacts within the community.

[7] Once again, it should be recalled that some municipalities with totally separated sanitary sewer systems may not be able to meet IKE's proposed design storm criterion, either.